# Attorney-General's references — are they always fatal?

By Paul Taylor KC

If the Attorney-General considers that a sentence passed in the Crown Court[1] is "unduly lenient", the sentence can be referred to the Court of Appeal (Criminal Division) [CACD] to be reviewed.[2] The CACD has the power to increase that sentence.[3]

Notification that the Attorney-General is referring a sentence to the CACD creates a terrifying prospect for most defendants (and, to a lesser extent, their lawyers[4]).

This is especially so when the defendant has received a non-custodial sentence and now faces the prospect of imprisonment[5], or where release from a custodial sentence is nearing but the term may now be increased significantly.

In 1988, during the passage of the Criminal Justice Bill, it was envisaged that applications by the Attorney-General would be made sparingly. The original estimate was for around a dozen such applications a year[6]. Between 22nd March 2023 and 6th February 2024 there were 150.[7]

Interestingly, out of the 137 cases referred and determined by the Court at the time the statistics were published[8], 45 sentences (or nearly 33%) were left unchanged.

So, back to the question in the title: Is an Attorney-General's Reference always fatal? Or in other words, does a reference guarantee an increased sentence? The statistics provide the clear negative answer. The statutory framework and approach of the CACD provide an understanding of why that is and in what circumstances the CACD will refuse to intervene.

There are two preliminary hurdles for the Attorney-General to cross before the CACD's *power* to increase a sentence is triggered. Firstly, there is a strict 28 day time limit for the service of the notice of reference. If missed, this cannot be extended. Secondly, the Attorney-General must obtain leave from the CACD. But even if leave is granted, the Court has three options[9]: leave the sentence unchanged[10], increase it, or even reduce it[11].

The approach of the CACD at the reference hearing is generally to consider the following issues:

1. Was the sentence in question too lenient?
2. If it was, was it "unduly" so?[12]
3. Should the Court exercise its discretion and interfere with the sentence, and if so in what way?

The various adjectives used in the authorities demonstrate the high threshold that must be passed before the Court will increase a sentence: The circumstances must be "exceptional", and where the sentencing judge has "fallen into gross error" and that a failure to alter the sentence would affect the public perception of the administration of justice.[13]

In *Attorney-General's Reference No 4 of 1989* (1989) 11 Cr App R(S) 517, Lord Lane CJ stated that: "A sentence is unduly lenient we would hold where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate …"

However, it must always be remembered that sentencing is an art rather than a science: the trial judge was particularly well placed to assess the weight to be given to various competing considerations, and leniency is not in itself a vice.

In R v Kodaolu and Benson [2023] EWCA Crim 525 [26] William Davis LJ cited the words of Lord Lane CJ (pictured below) and observed: "Those principles hold good today, save that sentences now must be considered by reference to the relevant Sentencing Council guidelines."

As stated above, even where the CACD considers that the sentence was unduly lenient, it still has a discretion as to whether to exercise its powers and increase the sentence, and if so by how much.

For example, an increase has been held to be unfair when it may jeopardise medical treatment[14], or where the offender had already carried out unpaid work and the part-payment of compensation made under the suspended sentence order[15]; or an increase may be of a lesser amount than would otherwise have been appropriate when the offender had responded well to the original sentence, because of the detrimental effect to others[16], or where there was "inordinate and inexcusable" delay in the original prosecution.[17]

Occasionally, the CACD will also reduce the sentence that would otherwise have been imposed to take account of the so called double jeopardy principle; the offenders likely anxiety and trauma of being re-sentenced under the reference procedure.[18]

Perhaps if there is one obvious "take away" from the above short analysis, it is the need to personalise submissions in response to a reference by identifying why in this particular case involving this particular defendant, the sentence was not unduly lenient, or if it was why it should not be increased.

*Paul Taylor KC is Head of the 5KBW Criminal Appeals Unit. He is the general editor of the third edition of Taylor on Criminal Appeals, the leading practitioners guide for those advising on a potential criminal appeal or judicial review, or an application to the Criminal Cases Review Commission. Paul has been described in Chambers and Partners as "One of the foremost appeal lawyers" (2022) "whose knowledge of criminal appeals is second to none" (2023). He has written and lectured on appellate issues in England, Northern Ireland and the Caribbean.*
*https://www.5kbw.co.uk/barristers/profile/paul-taylor-kc*

*See footnotes on next page.*

**Footnotes:**

1. The statutory scheme applies only to certain sentences as prescribed by the Criminal Justice Act 1988 or subordinate legislation. See Archbold Criminal Pleading Evidence and Practice 2024, para 7-440 onwards; Taylor on Criminal Appeals, para 13.27.
2. Criminal Justice Act 1988, s.36 [CJA 1988]
3. Ibid.
4. There is a story (perhaps apocryphal) of a particular judge who was renowned for passing such low sentences that an AG's reference would often follow. After a while, defence counsel would structure the "mitigation" at sentencing hearings to include a sufficient number of aggravating features that would persuade the judge to set the level of the sentence just high enough not to be considered "unduly" lenient.
5. For a recent example see *R v Valencia* [2023] EWCA Crim 1683 where sentences imposed on the 18 year old offender (youth rehabilitation order with intensive surveillance and supervision) were quashed and a total of 4 years detention substituted.
6. Standing Committee H, 23 February 1988, Criminal Justice Bill, col. 218.
7. https://www.gov.uk/government/publications/outcome-of-unduly-lenient-sentence-referrals (Last accessed: 12th March 2024)
8. 6th March 2024
9. CJA 1988, s.36(1)
10. In *R v Kodaolu and Benson* [2023] EWCA Crim 525 [34] leave was refused on the basis that the sentences "fell well within the bounds of what was reasonable given all the circumstances of the case. In our judgment the argument of HM Solicitor General ignores the need to take a nuanced approach to any sentencing guideline."
11. *Att-Gens Ref No 4 of 1989* (1989) 11 Cr App R (S) 517, 521.
12. It is not enough just to be lenient. See *R v Parry, Pawley and Brading* [2023] EWCA Crim 421 [32] per Macur LJ in refusing leave, "...we tend towards the view that the sentence is lenient, but it is not unduly so."
13. Most recently, see *R v Mboma* [2024] EWCA Crim 110 [24]; *R v Farrell Huband* [2024] EWCA Crim 317 [35]
14. *Skinner* Times 23 March 1993.
15. *R v Michael Wilson* [2023] EWCA Crim 673 [44]. See [45] "In those circumstances, although we grant the application for leave to make the Reference and although we find the sentence to be unduly lenient, we exercise our discretion not to interfere with the sentence."
16. See for example, *Attorney-General's Reference No 4 of 1989* (1989) 11 Cr App R(S) 517,521; *Att-Gens ref (No 17) of 2008)* [2008] RTR 29.
17. *R v Mboma* [2024] EWCA Crim 110
18. The CACD has stated that the circumstances in which such a reduction will be made are now "rare": *Att-Gen ref (No 45 of 2014) (Afzal)* [2014] EWCA Crim 1566.